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U.S. Environmental Protection Agency
Submitted by electronic mail to: draft_permitting_guidance@epa.gov

RE: Comments on Draft "Guidance on Plantwide Applicability Limitation Provisions Under the New Source Review Regulations"

The American Fuel & Petrochemical Manufacturers ("AFPM") respectfully submits the attached comments on the U.S. Environmental Protection Agency's ("EPA") draft memorandum dated February 13, 2020 entitled "Guidance on Plantwide Applicability Limitation Provisions Under the New Source Review Regulations ("draft PAL guidance" or "draft memorandum").[1]

AFPM is a national trade association representing nearly ninety percent of U.S. refining and petrochemical manufacturing capacity. AFPM members produce the fuels that drive the U.S. economy and the chemical building blocks integral to millions of products that make modern life possible. Many of its members operate an existing "major stationary source" for which an optional "actuals PAL" may be chosen as a permitting approach for New Source Review ("NSR").[2] The PAL provisions are intended to allow companies a simplified NSR applicability approach for changes at a major source without conducting project-by-project major NSR applicability analyses, as long as facility-wide actual emissions are less than a tons-per-year emissions limit. This ordinarily would be an attractive permitting approach for many major sources; however, very few AFPM members have elected to accept a PAL. The reason the current PAL option is not widely utilized is because it contains unnecessary requirements that create significant uncertainty as to whether a PAL will, in reality, provide "significant operational flexibility and permitting burden reduction.".

We appreciate the EPA's efforts to prepare the draft PAL guidance, which is intended "to address specific concerns raised by stakeholders and generally improve understanding of PALs," noting that the memorandum does not substitute for the EPA PAL regulations. By offering only this non-binding guidance instead of making substantive improvements to the PAL regulatory provisions, we believe that EPA may not be able to meaningfully address or resolve the underlying concerns that cause low participation in the PAL permitting program. This is especially true with the significant uncertainty from an agency using their discretionary authority to later reduce the PAL either through a PAL reopening (see Section I of comments) or at permit renewal (see Section IV of comments).

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[1] US EPA's webpage requesting comments on the draft guidance at https://www.epa.gov/nsr/forms/draft-guidance-plantwide-applicability-limitation-provisions-under-new-source-review.

[2] The term "actuals PAL" is used by the EPA to differentiate a PAL that is based on actual emissions from a PAL that would be based on allowable emissions. The EPA reserved the issue of allowable PALs for future consideration in its 2002 NSR Reform rule; therefore, the only PAL available by rule is an actuals PAL.

We offer suggestions and comments in the following sections to improve certainty with specific topics raised in draft PAL guidance. The sequence of our comments follows the topics listed in the draft memorandum and any regulatory citations reference the PAL provisions at 40 CFR §52.21(aa).

I. Implementation of Discretionary PAL Reopening Provisions Should Not be Conducted Except Under Rare and Defined Circumstances [Section II, Item 1 of Draft PAL Guidance]

Existing regulations set forth the following three circumstances that allow a reviewing authority discretion to reopen the PAL permit and reduce the emissions limitation:

> "(1) Reduce the PAL to reflect newly applicable Federal requirements (for example, NSPS) with compliance dates after the PAL effective date;
>
> (2) Reduce the PAL consistent with any other requirement, that is enforceable as a practical matter, and that the State may impose on the major stationary source or GHG-only source under the State Implementation Plan; and
>
> (3) Reduce the PAL if the reviewing authority determines that a reduction is necessary to avoid causing or contributing to a NAAQS or PSD increment violation, or to an adverse impact on an air quality related value that has been identified for a Federal Class I area by a Federal Land Manager and for which information is available to the general public." [§52.21(aa)(8)(*b*)(*1*)-(*3*)]

EPA's draft memorandum focuses on item (3) above with respect to reducing the PAL for air quality reasons. AFPM agrees with EPA's statement from stakeholders "… that the broad authority under this paragraph creates a lack of certainty about the PAL level during the permit term, and that it was unclear whether, and under what circumstances, a reviewing authority would invoke the provision."[3] EPA states in the draft PAL guidance that other mechanisms besides the PAL may be used in situations where a source's actual emissions are found to cause or contribute to an air quality violation. For example, States are able to implement SIP control measures regardless of whether the source has a PAL for that pollutant. Additionally, many air quality standards have short-term averaging periods, whereas a PAL is a 12-month rolling average.

AFPM believes that a discretionary reopening of the PAL for any reason under §52.21(aa)(8)(ii)(*b*) is not warranted and should not be implemented except in unique circumstances. Instead, the provisions for renewal of a PAL under §52.21(aa)(10) already provide for a reexamination of the level of the PAL.

More specifically with respect to item (3), AFPM believes that a PAL should not be used to address potential source-specific violations of the NAAQS and PSD Increment or Class I area impacts. As EPA notes, it is inappropriate to reduce the PAL on a tons-per-year basis to reflect ambient air standards that are not on the same averaging period. Additionally, if an emissions unit at a source is demonstrated to cause or contribute to a violation, presumably due to ambient monitoring data in conjunction with refined dispersion modeling analyses, then the focus of any emissions control and/or reduction should be at the emissions unit proper, and not to also reduce the source-wide PAL. Doing so inherently penalizes the

[3] Draft PAL Guidance at pages 2 and 3.

operational flexibility at other non-culpable emissions units at the source under a PAL. EPA should connect any consideration of an air quality violation to only the emissions unit(s) of concern, rather than to improperly penalize other emissions units at the source by reducing the PAL.

As noted above, EPA does not prescribe any circumstances and does not reference or describe procedures that a reviewing authority should consider in reducing a PAL for air quality reasons. For example, the use of highly conservative dispersion modeling techniques could theoretically be used by a reviewing authority to claim that a source's emissions cause or contribute to a violation. Such analyses or other procedures do not accurately reflect actual emissions from the emissions unit(s) or source on actual ambient air concentrations and should not be used to reduce the PAL. AFPM agrees with EPA that only in rare circumstances should the PAL be reduced when it is "necessary to avoid causing or contributing to" an air quality violation in this context. However, to avoid situations where an inappropriately conservative approach is used to make such a demonstration, the EPA should prescribe the technical procedures for a reviewing authority to determine both that a source is "causing or contributing" to an air quality violation and that a reduction to the PAL is "necessary." Such procedures should include, at a minimum, the use of ambient air monitoring data that is demonstrative of an actual violation in conjunction with refined dispersion modeling techniques for the emissions units of concern. Additionally, these procedures should require the basis for why a reduction to the PAL is necessary instead of or in addition to instituting an emissions limit at the unit(s) causing or contributing to the violation.

Finally, EPA's statement in the draft memorandum that other state implementation plan ("SIP") control measures may be used instead of the PAL to avoid a NAAQS or PSD increment violation ignores the provision of §52.21(aa)(8)(*b*)(*2*) to "reduce the PAL consistent with any other requirement … that the State may impose on the major stationary source … under the State Implementation Plan."[4] Thus, a reviewing agency may use the SIP control measure to reduce emissions at a unit, then use its discretion to reduce the source-wide level of the PAL, even though it was not demonstrated that emissions from other units at the source would cause or contribute to an air quality violation. As noted above, such a reduction to the PAL inappropriately penalizes the operational flexibility and growth potential at the rest of the source's activities that do not bear upon the potential air quality violation. EPA should prohibit the use of item (2) to reduce the PAL for this purpose.

II. Reviewing Authorities Should Accept a Source's Proposed Distribution of Emissions Pursuant to an Expiring PAL [Section II, Item 2 of Draft PAL Guidance]

If a PAL expires, paragraph §52.21(aa)(9)(i)(*b*) gives discretion to the reviewing authority to "… decide whether and how the PAL allowable emissions will be distributed and issue a revised permit incorporating allowable limits for each emissions unit, or each group of emissions units, as the Administrator determines is appropriate." AFPM agrees with stakeholder comments that such broad discretion and lack of criteria to distribute emissions is a disincentive to pursue a PAL.

AFPM also agrees with EPA's response in the draft memorandum that such distribution of emissions may be broad in nature and may even consist of a single emission limit or "cap" across all units at the same level as the PAL. AFPM believes that the regulated source should have flexibility to distribute the expired

[4] Draft PAL Guidance at page 2.

PAL as an emissions cap across all units or to any combination of emissions limits across certain units. Only in rare cases should a reviewing authority change the proposed limits with which the source must comply. In such cases, EPA should specify any design criteria or bases for which a reviewing authority would change these proposed limits. However, instead of EPA specifying such criteria for the reviewing authority, the draft PAL guidance mandates the source "must submit a proposed approach" and provide a "supporting rationale" for distribution of the PAL. Paragraph §52.21(a)(9)(i)(*a*) requires neither that the source submit an approach or rationale, only that it submits a proposed allowable emission limitation for each emissions unit or each group of emissions units; therefore, the draft PAL guidance as written proffers an additional obligation for the source that is not written in the PAL provisions. AFPM disagrees that a source must submit an approach or rationale.

Further, EPA does not stipulate the criteria for which an approach or rationale is to be developed for the reviewing authority's review. A source must ultimately comply with these distributed allowable emissions limit(s) and inherently must make decisions on how operations may be impacted in order to meet the new limit(s). A source may choose to volunteer information to the reviewing authority that forms the basis for the distributed limit(s), but also such decisions by the source to distribute emissions may reflect future plans that need to be held in confidence for business competitive purposes.

In summary, EPA should provide specific criteria in the PAL guidance why a reviewing authority would not accept a source's proposal for emissions distribution. The rule provides no rationale for an authority to reject a source's proposal, understanding that the source must ultimately comply with the emission limit(s) that they proposed with the supposition that the emission limit(s) will be accepted into a revised permit.

III. Future Relaxation of a Distributed Emissions Limit After a PAL Expires Does Not Automatically Trigger Major NSR Review [Section II, Item 2 of Draft PAL Guidance]

EPA states in the draft memorandum that when a PAL expires a distributed allowable emissions limit(s) is not subject to the source obligation provisions of §52.21(r)(4). This paragraph of the NSR program, when triggered, requires a reevaluation of NSR applicability when an enforceable limit relied upon to restrict the capacity of a source or modification to emit a pollutant is later relaxed. AFPM agrees with EPA that a distributed emissions limit is not subject to §52.21(r)(4). EPA instead states that relaxation of such limit(s) is considered a "change in the method of operation" as referenced in the definition of "major modification" at §52.21(b)(2)(i) and (iii) as well as in other NSR provisions. AFPM requests the regulatory basis for EPA's determination that conforms with relaxation of a distributed emissions limit inherently being considered a change in the method of operation.

In reality, if a distributed emissions limit would need to be later relaxed, it would most likely be as a function of a proposed construction project (i.e., a physical change or change in the method of operation) that causes an actual emissions increase at an existing unit, which is subject (either in whole or in part) to the distributed emissions limit(s). Since a physical change is already expected to occur, the project and the associated relaxation of the distributed emissions limit will already be subject to the NSR applicability provisions to determine the actual emissions impacts in order to determine if a major modification shall occur. Notwithstanding the need for EPA to clarify the regulatory basis that relaxing a distributed emissions limit is a change in the method of operation, AFPM believes that in most cases such a

relaxation will be tied to another physical change at the facility that will already be subject to project-by-project NSR applicability.

Regardless of whether the need to relax a distributed emissions limit is due to a physical change (like a construction project) or a change in the method of operation (such as relaxing the limit in and of itself, as EPA purports in the draft memorandum), AFPM understands that the non-PAL NSR applicability provisions in §52.21(a)(2)(iv) shall be used to determine the actual emissions impact of the change. A major modification is triggered only if the change results in a significant emissions increase and significant net emissions increase. If the actual emissions impact is not "significant" per §52.21(b)(23)(i) but the distributed limit needs to be relaxed, then a minor NSR permit with the reviewing authority is needed to increase the limit. AFPM requests EPA's confirmation that the "potential implications" of relaxing a distributed emissions limit(s) are that the applicability procedures of §52.21(a)(2)(iv) are to be followed for the "change" to determine if major NSR is triggered.

IV. The Level of a PAL Should Not Later Be Adjusted Downward Except Only in Unique Circumstances [Section II, Item 3 of Draft PAL Guidance]

AFPM believes the most significant disincentive from the regulated community to pursue a PAL is the discretionary nature of a reviewing authority to later decrease the level of the PAL. The substantial uncertainty in decreasing the PAL at renewal (or through discretionary re-openings as addressed in Section I of our comments) defeats the intent of the program for providing flexibility and regulatory certainty while preventing significant deterioration of air quality.

The term "automatic ratcheting" used by EPA in the draft memorandum is not merely a perception that reduces the "headroom" that a source may have to operate. As written, paragraph §52.21(aa)(10)(iv) gives unbridled discretion to a reviewing authority to reduce the PAL, which may prevent a company from reinvesting in new processes and equipment or otherwise respond competitively to market forces and cycles. Effectively, this provision of the PAL befits the adage that "no good deed goes unpunished" by penalizing a source for maintaining actual emissions well below the PAL, regardless of the reasons why actual emissions decreased. It also creates an incentive, unintended or not, for the source's operations to emit a pollutant at levels as close to the PAL as practicable for at least 24 consecutive months in the 10-year term in order to minimize the risk that the reviewing authority will reduce the level of the PAL at renewal. AFPM recommends that EPA speak to these practical consequences that are caused by the discretionary ratcheting provisions in §52.21(aa)(10)(iv).

AFPM believes that only in extraordinary circumstances should the PAL be reduced as a function of the source's actual emissions performance relative to the level of the PAL. AFPM agrees with EPA that reviewing authorities have numerous other control programs to reduce actual emissions at a source for a defined air quality regulatory purpose. Even in these cases, such control programs are normally directed to an individual unit or type of unit and not the entire source's actual emissions; thus, such control programs should not also penalize the rest of the source through a reduction to the PAL.

V. EPA Should Develop Streamlined Procedures for Terminating a PAL Where Part of a PAL Source is Sold to a Third Party [Section II, Item 4 of Draft PAL Guidance]

For terminating a PAL, EPA states in the draft memorandum that such situations are not expected to be common and provides no additional guidance on the matter. AFPM believes that a PAL termination is an important consideration for permittees in business situations where part of the facility is sold or transferred to a third party or is otherwise no longer part of the original stationary source for which the PAL was established. Such situations are not uncommon at very large industrial sites such as those operated by several of AFPM's member-companies. AFPM recommends that EPA provide guidance to streamline the process for a PAL termination, especially in situations of ownership transfer for parts of the PAL permit, in order to prevent the uncertainty of a PAL being an obstacle to these business transactions.

VI. Additional Monitoring and Validation Testing Requirements for a PAL Are Unnecessary [Section II, Item 5 of Draft PAL Guidance]

AFPM concurs with key concerns raised in relationship to the PAL monitoring provisions at §52.21(aa)(12), namely that: 1) a PAL could require more costly and complex emissions monitoring systems; 2) unnecessary validation testing is required at significant emissions units for emission factors within six months of PAL permit issuance; and 3) there is lack of specificity in acceptable approaches to address periods of monitoring data unavailability. AFPM also agrees with several points in EPA's draft memorandum as noted below:

- A PAL source is likely to be subject to extensive monitoring under other regulatory programs and that these monitoring provisions may already be adequate to quantify mass emission rates. AFPM believes that existing monitoring for other regulatory programs should meet the minimum requirements for a PAL and should be approved by the reviewing authority instead of requiring new, costly, and complex monitoring for the PAL. Where actual emissions monitoring and testing data are available, they should be used instead of emissions factors.

- If emissions factors are used for the PAL, then the value of the factors should be the same as that used for other purposes (e.g., emissions inventory) and do not need to be adjusted to account for uncertainty in the factors' development. However, if a factor is revised for monitoring purposes, then the PAL should be adjusted also. The bases for establishing the PAL and for monitoring against the PAL should be on the same basis where practical. AFPM believes that such a change is subject to the PAL reopening provisions of §52.21(aa)(8)(ii)(*1*) to "reflect a more accurate determination of emissions used to establish a PAL."

- Validation testing of emissions factors at a significant emissions unit is unnecessary if other testing or related contemporaneous emissions data are available. EPA also identifies other considerations before validation testing is necessary, such as the contribution of the unit's actual emissions to the PAL and the unit's margin between actual and potential emissions. Validation testing of emissions factors should only be necessary if there is no other available data for the emissions unit in question. AFPM believes such sources of information should not be limited only to performance tests using EPA reference test methods but should also consider other

credible data, such as emissions measured at the unit from a portable emissions analyzer or from other emissions testing performed for engineering purposes.

With respect to missing data procedures, AFPM appreciates the examples offered including the use of 40 CFR 75 subpart D and the PAL permit for the U.S. Capitol Power Plant. However, for the latter example, these missing data procedures could be overly conservative and result in inaccurately high reported emissions. For instance, when fuel usage monitoring is unavailable for a period of time, other available operating data (e.g., outputs such as measured steam production for a boiler or absorbed energy for a heater in conjunction with the unit's energy efficiency) should be considered as a surrogate to determine fuel usage instead of arbitrarily choosing the maximum daily fuel usage over an historical period. Similarly, for emissions monitoring, if other key operating parameters continue to be measured that indicate no change in emissions performance, then it is too conservative to simply use the highest hourly emission rates over an historical period. EPA should consider these available alternatives to more accurately determine missing data relevant to actual emissions.

VII. Baseline Actual Emissions from Replaced Units May be Used for Replacement Units in Setting a PAL [Section II, Item 6 of Draft PAL Guidance]

AFPM agrees with EPA's draft memorandum concerning the determination of baseline actual emissions for a "replacement unit," as defined at §52.21(b)(33), which is that baseline emissions from the unit that was replaced shall carry over to the replacement unit for both the initial and in subsequent NSR applicability analyses, including establishing a PAL.

However, AFPM believes that if a new unit that replaced a unit does not meet the definition of replacement unit or otherwise was not permitted as a replacement unit via the initial NSR applicability analysis, then the new unit is not a replacement unit for establishing the PAL. In this situation, depending on the baseline period chosen for the PAL, the unit is considered "newly constructed" for setting the PAL; therefore, the potential to emit ("PTE") of the new unit shall be used for setting the PAL and baseline actual emissions from the replaced unit shall be subtracted from the PAL.

VIII. AFPM Comments on EPA's General Advantages of PALs and Other Considerations [Section III of the Draft PAL Guidance]

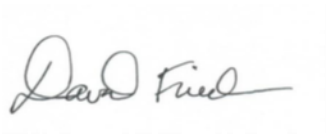
EPA promotes in the draft PAL guidance a "key advantage" of not performing project-by-project NSR applicability analysis as long as actual emissions remain below the PAL. AFPM agrees that establishment of the initial PAL and operating under the PAL has certain benefits during the initial 10-year term, assuming that the PAL permit is not reopened to reduce the PAL during this term. However, the certainty of these benefits erode as a function of the discretionary nature allowed by the reviewing authority to ratcheting down the PAL in the reopening and renewal regulatory provisions. It is unclear that EPA understands this consequence when it offers the example of an electric utility repowering from coal to natural gas that "could build significant additional margin under a PAL." In this scenario, EPA does not address the discretionary means by which a reviewing authority may then subsequently reduce the PAL (i.e., via an immediate reopening due to a SIP requirement that prohibits coal as an allowable fuel, or if actual emissions are less than 80% at renewal). Again, AFPM believes that the PAL should not be reduced at reopening or renewal if a source decides to take on projects that decrease actual emissions and thus provide "headroom" for potential future growth opportunities.

AFPM appreciates the clarity provided in Table 1 of the draft memorandum that is intended to determine the PAL contribution based on the status of an emissions unit during both the chosen baseline period and at the time of PAL application submittal. Case 3 refers to a unit that was in existence during the baseline period but is shutdown as a result of a PAL application submittal. AFPM recommends that the term "Permanently" be inserted before "Shut down" in the third column to be consistent with the regulatory language in the Notes column of Case 3.

Finally, AFPM raises the inconsistent nature in which certain state reviewing authorities have created new policy requirements or other mandated obligations for a source to obtain a PAL permit that effectively makes it too burdensome to obtain. For example, the Minnesota Pollution Control Agency has created a convoluted and burdensome dispersion modeling process for NAAQS and PSD Increment thresholds before obtaining a PAL that did not go through a rulemaking or public comment process.[5] Not coincidentally, no facility in Minnesota has received a PAL permit for any of the subject modeled pollutants (i.e., SO_2, NOx, CO, PM_{10}, $PM_{2.5}$). Such PAL-related policies, especially those that require dispersion modeling analyses for a PAL permitting action which do not result in a significant emissions increase, create inequities between states and disincentives that are inconsistent with their Federal SIP-approved NSR program. AFPM recommends that EPA prohibit any add-on requirements for a PAL that a state agency institutes without first going through a SIP rulemaking with opportunity for public comment.

Thank you for your consideration of these comments. Please feel free to contact me at 202-844-5508 or dfriedman@afpm.org if you have questions or need more information.

Sincerely,



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[5] See, for example, https://www.pca.state.mn.us/sites/default/files/nsr-reformmodelingpolicy.pdf at Section 6.